No. 9764

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MISUYE KOBAYASHI,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director of U. S. Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellee.

BRIEF OF APPELLEE.

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Preliminary Statement.

This appeal arises from an order of the District Court, Southern District of California [R. 12], dismissing the writ of habeas corpus theretofore issued by the same court in the case of Misuye Kobayashi and remanding said Misuye Kobayashi to the custody of the United States Immigration and Naturalization Service (appellee herein) for deportation. Certified Department of Justice file containing a transcript of the deportation proceedings, findings, and orders of the administrative authorities has been filed with the clerk of this court pursuant to a stipulation between the parties [R. 16].

Statement of Facts.

The appellant is an alien of the Japanese race, thirty-four years of age. She was born in Japan 1907 and is a citizen of that country. She resided in Japan continuously from birth until 1926. In October of that year she married Tomekichi Kobayashi in Japan. On December 14, 1926, she arrived a the port of San Francisco and applied for admission to the United States as a visitor for pleasure. Her entry as a visitor was denied, but on December 17, 1927, she was permitted to enter in transit to Mexico under a $500 bond. She departed to Mexico via San Ysidro, California, February 26, 1927. Thereafter on March 2, 1927, she applied at San Ysidro, California, for re-admission to the United States. Her application was denied on the ground that she was an immigrant not in possession of the immigration visa required of immigrants by the Immigration Act of 1924.

Following such exclusion the appellant gained entry into the United States on or about March 4, 1927, with the assistance of her husband, by walking through the brush in the river bottom back of the immigration office at San Ysidro. Having thus entered without detection, the appellant and her husband came by stage to San Diego, thence to Los Angeles. She has resided in the United States continuously since that date.

Appellant was taken into custody at Los Angeles June 13, 1939, under a warrant issued by the Secretary of Labor, charging that she was in the United States "in

violation of the Immigration Act of 1924 in that you are an alien ineligible to citizenship and not exempted by paragraph (c), Section 13 thereof." The alien was released the same day under a $1,000 bond. Thereafter hearings were held at which appellant was represented by counsel. At the conclusion thereof, the Examining Inspector found the alien to be unlawfully in the United States as charged in the warrant of arrest, and in addition, found the alien to be deportable on the further ground:

> "She is in the United States in violation of the Immigration Act of 1924 in that at the time of entry she was not in possession of an unexpired immigration visa."

Transcript of the hearing together with the exhibits introduced therein and counsel's brief was forwarded to the Department in Washington, D. C. It was there reviewed by the Board of Review. The Board recommended that a warrant be issued directing the alien's deportation to Japan.

The findings and conclusion of the Board were adopted by the Department and under date of December 18, 1939, an assistant to the Secretary of Labor caused his warrant to be issued directing the deportation of the appellant to Japan on the grounds above stated [R. 10]. The Department later withdrew this warrant and on January 22, 1940, issued a telegraphic warrant which provided that voluntary departure of appellant would be a satisfactory compliance with its terms. She was given until July 1,

1940, within which to voluntarily depart. Prior to that date, in view of various letters written by interested parties, the case was again reviewed; but on June 13, 1940, the Department directed that further extension of appellant's stay in the United States be denied. The appellant failing to depart, the Department on December 5, 1940, issued a further warrant superseding the warrant of December 18, 1939 and telegraphic warrant issued January 22, 1940. This last warrant directed the deportation of Misuye Kobayashi to Japan upon the same grounds as the two previous warrants. Appellee was about to execute the warrant when a writ of habeas corpus was filed in the District Court. After hearing, the lower court entered an order dismissing the writ of habeas corpus and remanded the alien to appellee [R. 12].

The Issues.

Cases of the character here involved have been before this Honorable Court on numerous occasions and the issues are familiar. They generally present but three issues, namely:

(1) Was a fair hearing accorded?

(2) Is there some substantial evidence to support the administrative finding?

(3) Has the law been correctly applied?

Ng Fung Ho v. White, 259 U. S. 276.

Appellee submits the foregoing sets out the only issues presented by the case at bar.

ARGUMENT.

A review of this type of case in habeas corpus proceedings is circumscribed by well defined principles. A petition for a writ of habeas corpus challenges only the lawfulness of the custody and detention of the prisoner. It cannot be used as a means of securing the judicial determination of any other question:

> *Story v. Rivas,* 97 Fed. (2d) 182, 188, and cases therein cited.

If, from an examination of the record, the court finds there has been no erroneous application of a rule of law it follows that the administrative decision will not be disturbed:

> *Quon Quon Poy v. Johnson,* 273 U. S. 352, 358;
> *Chin Yow v. United States,* 208 U. S. 8;
> *Quock Jan Fat v. United States,* 253 U. S. 454.

On the First Issue.

The procedure which resulted in the issuance of the order of deportation was fair in every respect. An examination of the immigration record will show that the hearing was conducted in conformity with the rules and regulations prescribed by the Secretary of Labor and conformed with all the requirements of "due process." Rules prescribed by the Secretary of Labor pursuant to law have the full force and effect of law:

> *Fok Yung Yo v. United States,* 185 U. S. 296;
> *Chun Shee v. White,* 9 Fed. (2d) 342 (C. C. A. 9);
> *Haff v. Tom Tang Shee,* 63 Fed. (2d) 191 (C. C. A. 9).

The alien was fully informed of the nature of the proceedings and her right to counsel; and she did in fact employ counsel. No part of the evidence upon which the warrant was issued was concealed or withheld from her or her counsel and she was not deprived of the privilege of bringing forward explanatory or rebuttal evidence. The alien was permitted to introduce testimony in her own behalf and a brief was submitted by counsel which was considered by the Board of Review simultaneously with the record of hearing. This was not denial of a fair hearing.

As the hearings under the warrant were properly conducted with regard to the rights of the alien, under the rule of:

Bilokumsky v. Tod, 263 U. S. 149,

and as set forth in the following cases:

In re Kosopud, 272 Fed. 330, citing *Low Wah Suey v. Backus,* 225 U. S. 460, 471; *Mok Nuey Tau v. White* (C. C. A. 9), 224 Fed. 743; *Guiney v. Bonham* (C. C. A. 9), 261 Fed. 582, 585; *Wolck v. Weedin* (C. C. A. 9), 50 Fed. (2d) 928, 930.

the test of a fair hearing has been met.

On the Second Issue.

Appellee submits that the evidence overwhelmingly supports the order of deportation. The alien was ordered deported because it was found that at the time of her entry into the United States,

(1) she was an alien ineligible to citizenship and not exempted by paragraph (c) section 13 of the 1924 Act; and

(2) she was not in possession of an unexpired immigration visa.

In reference to the first ground upon which the warrant of deportation was issued, it is undisputed that the alien is a native and citizen of Japan, of the Japanese race. She is therefore of a race ineligible to citizenship:

Takeo Ozawa v. United States, 260 U. S. 178.

Section 13c of the Immigration Act of May 26, 1924 (8 U. S. C. A. 213c), in effect at time of alien's entry in 1927 provides:

> "Sec. 13c. No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d) or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

The only claim the alien could have to the exemptions set forth above would be that she was of the class shown in (3) of Section 13c above quoted in that she was a

visitor. The evidence shows she has resided in this country continuously since her surreptitious entry in 1927, and that prior to said entry, she applied for admission as a visitor and was denied admission on the ground she was not a *bona fide* visitor. The evidence also shows she was not in possession of an unexpired immigration visa at the time of her entry (p. 6 of immigration hearing).

On the Third Issue.

There has been no erroneous application of law by the administrative officials.

The order of deportation is based on that portion of Section 13 of the Immigration Act of May 26, 1924 (8 U. S. C. A. 213, 213c) which reads as follows:

> "Sec. 13(a) No immigrant shall be admitted to the United State unless he (1) has an unexpired immigration visa * * *."
>
> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4 * * *."

and that portion of Section 14 of the same Act (8 U. S. C. A. 214) which provides:

> "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States, * * * shall be taken into custody and

deported in the same manner as provided for in sections 19 and 20 of the immigration act of 1917: * * *."

Section 19 of the immigration Act of February 5, 1917 (8 U. S. C. A. 155) provides:

> "* * * That any person who shall be arrested under the provisions of this section on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. *In every case where any person is ordered deported from the United States under the provisions of this act, or any law or treaty, the decision of the Secretary of Labor shall be final.*" (Emphasis ours.)

Thus it is clear that no alien may be admitted to the United States for permanent residence without first securing an immigration visa; and no alien ineligible to citizenship shall be admitted to the United States unless he comes within the exemption specified in Section 13(c), *supra*. The alien in the case at bar does not fall within any of the exemptions specified in Section 13(c). She admits that on or about March 4, 1927, she entered the United States surreptitiously at a place near the port of San Ysidro, California and that at the time of such entry she was not in possession of an unexpired immigration visa, as required by Section 13(a) of the 1924 Immigration Act, *supra* (p. 6 of hearing).

Consequently the appellant is subject to deportation under the provisions of Section 14 of the 1924 Act, *supra,* as an alien who at the time of entry was not in possession of an unexpired immigration visa.

United States v. Van Biervliet, 284 U. S. 590;

Thamun Sing v. Haff (C. C. A. 9), 83 Fed. (2d) 679.

The alien was therefore properly ordered deported from the United States.

Reply to Appellant's Brief.

Counsel argues that the deportation of the appellant is barred by reason of the three-year period of limitation prescribed for deportation on the ground of entry without inspection. Such ground for deportation was never urged in the deportation hearing. The grounds on which the deportation of Misuye Kobayashi is sought, as stated above, are fully set forth in the warrant of deportation [R. 10]. Deportation proceedings are predicated upon the Immigration Act of 1924. Section 14 of that Act, *supra,* directs the deportation of "Any alien who *at any time after entering the United States* is found to have been at the time of entry not entitled under this act to enter the United States." (Emphasis ours.) Counsel appears to have confused the 1924 Immigration Act with the 1917 Immigration Act. Section 19 of the Act of February 5, 1917 (8 U. S. C. A. Sec. 155) reads as follows:

> "* * * at any time within three years after entry, any alien who shall have entered the United States * * * by land at any place other than one designated as a port of entry for aliens by the Com-

missioner of Immigration and Naturalization * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *."

This Act clearly has no application to the case at bar. It is well established that no period of limitation is set upon the deportation of aliens who enter the United States in violation of the Immigration Act of 1924:

U. S. ex rel. Fink v. Reimer (C. C. A. N. Y. 1938), 96 Fed. (2d) 217; (Cert. den. 1939, 305 U. S. 618);

Kishan Singh v. Carr (C. C. A. 9, 1937), 88 Fed. (2d) 672.

Counsel's contention that the deportation of Misuye Kobayashi is barred by the statute of limitations is not founded in law or fact.

Counsel also contends that the appellant was in possession of an immigration visa at the time of her surreptitious entry into the United States and is therefore not subject to deportation on the ground of non-possession of a visa. It will be seen, however, that the passport visa granted the appellant in Japan permitting her to apply for admission as a visitor was the only visa which she had in her possession. She presented this passport visa to the immigration officers at the port of San Ysidro and her application for admission into the United States was considered by a Board of special Inquiry. The board found that the appellant was not a *bona fide* non-immigrant, as defined in

Section 3 of the Immigration Act of 1924 (43 Stat. 153). This Act and the regulations promulgated thereunder define the term "immigrant" as meaning:

> "* * * any alien departing from any place outside the United States destined for the United States except (1) a Government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, * * *".

and Section 15 of the Act provides that:

> "the admission to the United States of an alien excepted from the class of immigrants by clause (2) * * * of section 3 * * * shall be for such time as may be by regulations prescribed."

And under Regulations to Govern Enforcement of the Immigration Act of 1924 is General Order No. 30, June 6, 1924, which was in effect at the time of appellant's entry:

> " 'An alien visiting the United States temporarily as a tourist or temporarily for business or pleasure' shall be construed to mean an alien coming to the United States to remain not more than six months."

The appellant clearly was an immigrant as defined by Section 3 of the 1924 Act, *supra*. At the time of her surreptitious entry on or about March 4, 1927, she obviously was coming to the United States to take up permanent residence and not for a temporary visit of less than six months. This was the view of the Board of Special Inquiry at San Ysidro after hearing the husband's assertion that he desired his wife to remain with him in the

United States, and also the fact that Misuye Kobayashi did not acquire a domicile in Mexico.

The visa presented by appellant to the Board of Special Inquiry at San Ysidro consisted of a Japanese passport duly visaed by a United States consular officer in Japan and permitted her to apply for admission only as a non-immigrant visitor. The distinction between a visitor's (non-immigrant) visa and an immigrant's visa was pointed out by this court in:

> *Del Castillo v. Carr* (C. C. A. 9, 1938), 100 Fed. (2d) 338, 341.

In that case the court said:

> "The immigration law provides for inspection of every person applying for entry for an indeterminative period and such person under the law is termed an immigrant. The evidence in this case is sufficient to sustain a finding that instead of a visitor, appellant was in fact an immigrant when he entered the United States at Brownsville. This being true his written permit to be in the United States as a visitor was of no validity. And even if we should hold that this permit would remain valid until declared invalid upon a direct attack, it would avail appellant nothing. The evidence convinced the Assistant Secretary of Labor that appellant was an immigrant when he reentered at San Ysidro. In this status a permit theretofore issued to appellant as a visitor and not yet expired would not affect the necessity of inspection when he again applied at the border for entrance."

Conclusion.

Under the law and the authorities hereinabove set forth, there appears to be little question as to the right of the Department to order the alien's deportation to Japan. She is clearly subject to deportation and the warrant of deportation was issued after a fair hearing. Wherefore, appellee respectfully prays that the decision of the lower court be affirmed.

Respectfully submitted,

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